89-432

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

DAVID L. PICOU,
Petitioner,
vs.
JIM GILLUM, Sheriff of Pasco County, Florida, and
JAMES T. RUSSELL, State Attorney,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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46 pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE FLORIDA MANDATORY MOTORCYCLE HELMET LAW, SECTION 316.211, FLA.STAT. (1987) VIOLATES THE CONSTITUTIONAL RIGHT OF PRIVACY PROTECTED BY THE FIRST AMENDMENT TO THE CONSTITUTION.

WHETHER THE FLORIDA MANDATORY MOTORCYCLE HELMET LAW, SECTION 316.211, FLA.STAT. (1987) VIOLATES THE NINTH AMENDMENT TO THE CONSTITUTION.

WHETHER THE FLORIDA MANDATORY MOTORCYCLE HELMET LAW, SECTION 316.211, FLA.STAT. (1987) VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

WHETHER THE FLORIDA MANDATORY MOTORCYCLE HELMET LAW, SECTION 316.211, FLA.STAT. (1987) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

WHETHER THE FLORIDA MANDATORY MOTORCYCLE HELMET LAW, SECTION 316.211, FLA.STAT. (1987) VIOLATES THE CONSTITUTIONAL RIGHT TO PRIVACY IMPLIED IN AND PROTECTED BY THE INTERACTION OF ONE OR MORE OF SAID CONSTITUTIONAL PROVISIONS WITH EACH OTHER.

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OPINION BELOW

The opinion of the Court of Appeals to be reviewed is published at 874 F.2d 1519. A copy is appended as A1. The opinion below of the District Court for the Middle District of Florida has not been published. A copy is appended as A10. A 1987 opinion of the Court of Appeals in an earlier appeal in this case appears at 813 F.2d 1121. A copy is appended at A14. An unpublished 1986 opinion of the district court is appended at A18.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit sought to be reviewed is dated June 13, 1989, and was entered June 13, 1989 (A20). No petition for rehearing was filed. Jurisdiction to review this judgment is conferred on this court by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Ninth Amendment to the Constitution reads:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Fourteenth Amendment to the Constitution reads in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

The Florida Mandatory Motorcycle Helmet Law, Section 316.211, Fla.Stat. (1987), reads in full:

316.221 Equipment for motorcycle riders.

(1) No person shall operate or ride upon a motorcycle unless he is properly wearing protective headgear securely fastened upon his head which complies with standards established by the department.

(2) No person shall operate a motorcycle unless he is wearing an eye-protective device over his eyes of a type approved by the department.

(3) This section shall not apply to persons riding within an enclosed cab.

(4) The department is authorized to approve protective headgear made to specifications drawn and devised by, or approved by, the American National Standards Institute, the United States Department of Transportation, the United States Consumer Products Safety Commission, the United States Department of Defense, or any other entity which can provide equally effective equipment specifications. The department shall publish lists of protective equipment, and such lists shall be made available by request to all users of such equipment.

STATEMENT OF THE CASE

A

Alleging that he was a resident of Pasco County, Florida, that he owns and rides a motorcycle, and that he feared arrest and prosecution under the Florida Mandatory Motorcycle Helmet Law, Section 316.211, Fla.Stat. (1987), if he rides without a helmet, petitioner, David L. Picou, brought an action under the Federal Civil Rights Act of 1871, 42 U.S.C. Section 1983 in the District Court of the United States for the Middle District of Florida. Defendants were the Sheriff of Pasco County and the State Attorney for Pasco County. The relief sought was a declaratory judgment that the Florida helmet law was unconstitutional on the grounds of privacy, due process, and equal protection under the First, Ninth, and Fourteenth Amendments to the United States Constitution and an injunction prohibiting its enforcement.

The district court dismissed the action, relying upon *Simon v. Sargent,* 346 F.Supp. 277 (D. Mass. 1972), aff'd mem., 409 U.S. 1020 (1973) (A18). On appeal the Court of Appeals for the Eleventh Circuit vacated and remanded, holding that *Simon v. Sargent* decided only issues of due process and equal protection and did not reach the privacy issue raised by petitioner Picou in the district court. Accordingly, the appellate court returned the case to the district court for a decision on the privacy ground (A17).

On remand the district court considered the privacy issue, decided it adversely to Picou, and again dismissed the action, entering judgment for the defendants (A10).

On a second appeal involving the privacy issue, the Court of Appeals for the Eleventh Circuit affirmed the district court's decision on privacy grounds (opinion authored by Powell, Associate Justice of the Supreme Court, retired, sitting by designation) (A1). This petition for certiorari was then filed.

B

The question whether a mandatory helmet law is unconstitutional on due process and equal protection grounds has been raised and preserved in the courts below and is included in the questions presented for review by this court. This court, of course, is free to consider the present case on its merits without reference to the earlier summary affirmance in *Simon v. Sargent, supra*. See *Bowers v. Hardwick*, 478 U.S. 186, 198, n. 4 (1986).

The central issue presented is whether the Constitution protects a general right of privacy. The correlative question is whether a motorcycle helmet law, including Florida's version of such a law, violates such a general right of privacy.

REASONS WHY THE WRIT SHOULD BE ISSUED

Roe v. Wade, 410 U.S. 133 (1973), changed the focus of the constitutional right of privacy from the particular to the general. The focus had been on particular situations and relationships traditionally private. In *Roe* the court reviewed "a line of decisions" commencing with *Union Pacific Railroad Co. v. Botsford,* 141 U.S. 250 (1891), and found that all of them, except *Botsford* itself, involved particular physical locations or intimate personal relationships where American tradition placed a high value upon privacy.

> "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 US 250, 251, 35 L Ed 734, 11 S Ct 1000 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v Georgia, 394 US 557, 564, 22 L Ed 2d 542, 89 S Ct 1243 (1969); in the Fourth and Fifth Amendments, Terry v Ohio, 392 US 1, 8-9, 20 L Ed 2d 889, 88 S Ct 1868 (1968), Katz v United States, 389 US 347, 350, 19 L Ed 2d 576, 88 S Ct 507 (1967), Boyd v United States, 116 US 616, 29 L Ed 746, 6 S Ct 524 (1886), see Olmstead v United States, 277 US 438, 478, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v Connecticut, 381 US, at 484-485, 14 L Ed 2d 510, in the Ninth Amendment, id., at 486, 14 L

> Ed 2d 510 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v Nebraska, 262 US 390, 399, 67 L Ed 1042, 43 S Ct 625, 29 ALR 1446 (1923). These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v Connecticut, 302 US 319, 325, 82 L Ed 288, 58 S Ct 149 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v Virginia, 388 US 1, 12, 18 L Ed 2d 1010, 87 S Ct 1817 (1967); procreation, Skinner v. Oklahoma, 316 US 535, 541-542, 86 L Ed 1655, 62 S Ct 1110 (1942); contraception, Eisenstadt v Baird, 405 US, at 453-545, 31 L Ed 2d 349; id., at 460, 463-465, 31 L Ed 2d 349 (White, J., concurring in result); family relationships, Prince v Massachusetts, 321 US 158, 166, 88 L Ed 645, 64 S Ct 438 (1944); and child rearing and education, Pierce v Society of Sisters, 268 US 510, 535, 69 L Ed 1070, 45 S Ct 571, 39 ALR 468 (1925), Meyer v Nebraska, supra."
>
> 410 U.S. at 152-3.

The court recognized in *Roe*, however, that a woman's pregnancy did not fit within a constitutional theory of privacy which focused merely upon physical location or intimate personal relationship.

> "The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material,

> or marriage, or procreation, or education, with which Eisenstadt, Griswold, Stanley, Living, Skinner, Pierce, and Meyer were respectively concerned."
>
> 410 U.S. at 159.

Finding that a woman's decision to have an abortion had no legal impact upon others, at least during the earlier period of her pregnancy, the court refocused the constitutional right of privacy in terms of a woman's right-to-be-let-alone in purely personal decision-making during the earlier part of her pregnancy.

The first case that the court had cited as "perhaps," 410 U.S. at 152, beginning its line of privacy decisions, *Union Pacific Railroad Company v. Botsford*, 141 U.S. 250, 35 L.Ed. 734 (1891), expressly referred to the common law right "to be let alone," and applied it to "wearing apparel":

> "As well said by Judge Cooley, 'The right to one's person may be said to be a right to complete immunity: *to be let alone.*' Cooley on Torts, 29.
>
> "For instance, not only *wearing apparel*, but a watch or a jewel, worn on the person, is, for the time being, privileged from being taken under distress for rent, or attachment on mesne process, or execution for debt, or writ of replevin."
>
> 35 L.Ed. at 737 (emphasis added).

Thus *Botsford* was the underpinning of *Roe*. The physical-privacy and special-relationship cases which followed *Botsford* were a sub-class in the larger class of right-to-be-let-alone cases. This is why the court said that "perhaps," 410 U.S. at 152, *Botsford* was the beginning of the "privacy" line of cases even though the subsequent cases in the line (up until *Roe*) had all belong to the sub-class of physical-privacy and special-relationship cases.

Petitioner, Picou here, like the pregnant woman in *Roe*, qualifies for inclusion in the right-to-be-let-alone class of cases even though neither of them qualifies for inclusion in the sub-class of physical-isolation and special-relationship cases.

B

In returning the constitutional right of privacy to its proper focus as the right to be let alone in purely personal decision making, the court in *Roe* was continuing the shift to privacy grounds which it had earlier made in Fourth Amendment search and seizure cases:

> "Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."
>
> *Katz v. United States*, 389 U.S. 347, 353 (1967).

The decisions of this court support the thesis that there is general constitutional right to privacy and that it can broadly be identified as the traditional common law right to be let alone. To be sure, the opinion below quotes *Katz v. United States, supra,* for the proposition that—

> "'. . . [t]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual states.' Katz v. United States, 389 U.S. 347, 350-51. . . ."

(quoted at A7). The holding in *Katz*, however belies that dictum. The thrust of that decision is that there is a general right of privacy, protected in that case by the

Fourth Amendment. This general right of privacy, as *Katz* illustrates, is the foundation of the Fourth Amendment and is more general in scope than, and extends beyond, the specific protection which the Fourth Amendment expressly provides. Whether there was a general right of privacy underlying the Fourth Amendment was the issue dividing the seven member majority, who necessarily confirmed its existence by their holding, from the dissent of Justice Black, who expressly rejected it:

> "While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal of broad policy discussions and philosophical discourses on such nebulous subjects as *privacy*, for me the language of the [Fourth] Amendment is the crucial place to look in construing a written document such as our Constitution."
>
> 389 U.S. at 365 (Black, J., dissenting, emphasis added).

Confirming that his disagreement with the majority was over a general right of privacy, Justice Black argued that the Fourth Amendment protected only " 'persons, houses, papers and effects' " in a physical sense and that its express reference to the " 'person or things to be seized,' " *ibid.*, excluded any intangible intrusions which might violate a general right of privacy:

> "A conversation overheard by eavesdroppings whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the Amendment apply to overhear-

> ing future conversations which by their very nature are nonexistent until they take place. How can one 'describe' a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? . . . Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping."
>
> 389 U.S. at 365-66.

The majority's rejection of this literally correct argument and its conclusion, quoted above, that the Fourth Amendment "protects people," 389 U.S. at 353, is explainable only in terms of an underlying general right of privacy which the majority was protecting through a refocusing of the Fourth Amendment upon that right.

Katz was decided against a background of constitutional interpretation in which *Griswold v. Connecticut*, 381 U.S. 479 (1965), had already articulated the constitutional right of privacy—the right to be let alone in purely personal decisions and the purely personal activities to which those decisions relate. Citing the First, Third, Fourth, Fifth, and Ninth Amendments the *Griswold* court found

> ". . . that specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. . . . [381 U.S. at 484]
>
> * * *
>
> "We have had many controversies over these penumbral rights of 'privacy and repose.' . . . These cases bear witness that the right of privacy which presses for recognition here is a legitimate one."
>
> 381 U.S. at 484-5.

A majority of the court in *Griswold* (five members) affirmed the existence of a general constitutional right of privacy, against two dissenting members who expressly challenged the existence of any such general right (two other members rested their concurrence in the result reached by the majority on other grounds). Justice Black, as he was later to repeat in *Katz*, denied altogether the existence of any underlying general right to privacy, although he acknowledged that protection of personal privacy was sometimes the result of the operation of some other rights expressly secured, such as "the Fourth Amendment's guarantee against 'unreasonable searches and seizures.'" [381 U.S. at 509]:

> "The court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not."
>
> 381 U.S. at 508.

Justice Stewart, who was later to write the opinion of the Court in *Katz, supra,* stated in dissent:

> "What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy 'created by several fundamental constitutional guarantees.' With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."
>
> 381 U.S. at 530.

As noted earlier, Justices Stewart and Black parted company with each other on the privacy issue in *Katz, supra,*

where Justice Stewart wrote the opinion for the Court and Justice Black dissented.

The question in *Katz* was whether unauthorized wire-tapping of a public telephone booth by governmental agents violated the Fourth Amendment. *Olmstead v. United States,* 277 U.S. 438 (1928) had held that the Fourth Amendment was not violated by wire-tapping because there was no "actual physical invasion" and no "search or seizure within the meaning of the Fourth Amendment." 277 U.S. at 466. *Olmstead* was a 5-4 decision and is today most notable for Justice Brandeis' dissenting opinion identifying the right to privacy as the basis of the Fourth and Fifth Amendments "to protect Americans in their beliefs, their thoughts, their emotions and their sensations" and conferring upon them,

> "as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."
>
> 277 U.S. at 478.

To reach the result in *Katz,* it was necessary to overrule *Olmstead.* This Justice Stewart did, writing that *Olmstead* "can no longer be regarded as controlling." *Katz,* 389 U.S. at 353. Thus in *Katz* Justice Stewart wrote to overrule *Olmstead* while at the same time writing that "a person's *general* right to privacy—his right to be let alone by other people" is largely beyond the scope of the Constitution. 389 U.S. at 351-2 (emphasis in text). An appropriate interpretation of this language is that there *is* a general right to privacy embedded in the Constitution but that it awaits definition. This is because the approach of this Court has been to identify from time to time particular places or relationships which "press for recogni-

tion," *Griswold,* 381 U.S. at 485, but not to identify the underlying principle by which those specific instances are themselves identified. Tests such as whether a privacy right pressing for recognition is "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319 (1937), cited for this purpose in *Bowers v. Hardwick,* 478 U.S. 186, 191 (1986) were calculated to aid only in the identification of additional specific protected situations, and did not bring the court any closer to the formulation of a general rule as to what common element characterizes the general constitutional right to privacy. Indeed the court in *Bowers* expressed itself as disinclined

> "to take a more expansive view of our authority to discover new fundamental rights embedded in the Due Process Clause."
>
> 478 U.S. at 194.

Distaste for that piecemeal approach, necessarily unsatisfying, need not foreclose the search for a general rule which, when formulated, should help to resolve the untouched issues in the privacy area. That the need for such a search remains before the Court was evidenced by statements in this Court's July 3, 1989, decision in *Webster v. Reproductive Health Services, Inc.,* ..... U.S. ....., 106 L.Ed.2d 410:

> "The dissent takes us to task for our failure to join in a 'great issues' debate as to whether the Constitution includes an 'unenumerated' general right to privacy as recognized in cases such as Griswold v. Connecticut, 381 U.S. 479, 14 L.Ed.2d 510, 85 S. Ct. 1678 (1965) and Roe."
>
> ..... U.S. at ....., 106 L.Ed.2d at 437 (Renquist, C.J.).

> "The plurality does not even mention, much less join, the true jurisprudential debate underlying this case: whether the Constitution includes an 'unenumerated' general right to privacy as recognized in many of our decisions. . . ."
>
> ..... U.S. ....., 106 L.Ed.2d at 454 (Blackmun, J., dissenting).

Botsford, Griswold, Katz and *Roe* indicate that this court has already implicitly answered that question and that it only remains for the Court, as *Bowers* and *Webster* forecast, to articulate that there is a general constitutional right of privacy.

C

The Ninth Amendment has its legal effect as a rule of construction. This is apparent from the text itself where the operative words are "shall not be construed":

> "The enumeration . . . of certain rights . . . *shall not be construed* to deny or disparage others retained by the people."

That the Ninth Amendment has its legal effect as a rule of construction is clear also from *Griswold* where it received its most extensive analysis.

> Justice Douglas wrote for the Court in *Griswold* that
>
> "specific guarantees in the Bill of Rights have penumbrus, formed by emanations from those guarantees that give them life and substance."
>
> 381 U.S. at 484.

Without characterizing the Ninth Amendment as a rule of construction he quoted it verbatim. *Ibid.*

Justice Goldberg, concurring, wrote:

> "I do not mean to imply that the Ninth Amendment is *applied against* the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an *independent source* of rights. . . . Rather, the Ninth Amendment shows . . . an intent that the list of rights included there *not be deemed* exhaustive."
>
> 381 U.S. at 492 (emphasis added).

In other words, the Ninth Amendment creates no rights. It prescribes the rule of construction by which other rights shall be interpreted and construed.

Justice Black, dissenting, stated that the Ninth Amendment had never been interpreted to be "a weapon of federal power," 381 U.S. at 520, which could be relied upon as "a reason for striking down [a] State law." *Ibid.*, 522. On the other hand he had nothing to say about it as a rule of construction in assessing the scope of other expressly enumerated rights.

Justice Stewart, dissenting, stated that

> "The Ninth Amendment, like its companion the Tenth, which this Court held 'states but a truism that all is retained which has not been surrendered,' United States v. Darby, 312 U S 100, 124 . . . [was never intended to be used] to annul a [State] law."
>
> 381 U.S. at 529-30.

Like Justice Black, he had nothing to say about the Ninth Amendment as a rule of construction.

Unless the Ninth Amendment is to be ignored as having no meaning, it must be accepted for which it

purports in its text to be, a rule of construction. As a rule of construction it can operate, of course, as effectively as a specific grant of rights.

Like the Ninth Amendment, the Eleventh Amendment was enacted as a rule of construction. It uses the same operative words as to how another part of the Constitution shall be construed:

> "The Judicial power of the United States *shall not be construed* to extend to. . . ."
>
> Eleventh Amendment, quoted in part (emphasis added).

As a rule of construction, the Eleventh Amendment operates to reduce the scope of a right granted (the judicial power granted by Article III of the Constitution). *Edelman v. Jordan*, 415 U.S. 651 (1974). By contrast, the Ninth Amendment, as a rule of construction, increases the scope of rights elsewhere enumerated.

As a rule of construction the Ninth Amendment requires this Court, in considering the extent of a right *enumerated* in the Constitution, to consider also whether other similar rights may have been *retained by the people*, of which the right enumerated was intended to be indicative rather than exclusionary. As a rule of construction the Ninth Amendment supplants and rejects the rule of construction to the opposite effect "Expressio unius est exclusio alterius." (The expression of one thing is the exclusion of another. 35 C.J.S. 340 (1960)).

The legal effect of the Ninth Amendment is, when the extent of an enumerated right is under consideration, to bring up for consideration whether other unenumerated rights exist which touch upon the subject

matter of the right enumerated. In this context the dissenting opinion of Justice Brandeis in *Olmstead, supra,* which identified the right of privacy as an unenumerated right retained by the people forced the eventual overruling of *Olmstead* in *Katz, supra,* on the theory that the Fourth Amendment "protects people"—in a privacy sense—and thus does more than merely protect their "persons, houses, papers, and effects" in a physical sense, as Black, J., dissenting, had contended. The majority in *Katz,* was in effect applying the Ninth Amendment's express rule of construction to the Fourth Amendment instead of the usual rule "Expressio unius est exclusio alterius." All of the decisions of this Court recognizing penumbras and areas of privacy not specified in the Bill of Rights can be reconciled and harmonized by reference to a general right of privacy which, the Ninth Amendment indicates, was retained by the people.

D

Fundamental to the right of privacy is the principle that the individual is free from governmental interference in purely personal decision making. There is no compelling state interest that the individual make a "correct" decision in a purely personal matter. *Roe v. Wade, supra.* The state is, of course, free to commit or withhold its funds to attempt to persuade the individual to make a "correct" decision, *Webster,* ..... U.S. ....., 106 L.Ed.2d at 419, but it cannot dictate that decision. The government's continuing efforts to persuade, but not prohibit, individuals from smoking cigarettes is a case in point.

Botsford, supra, teaches that the right of privacy is selecting one's own wearing apparel has long been fun-

damental. This Court implicitly acknowledged the continuing vitality of that right in *Kelly v. Johnson*, 425 U.S. 238 (1976) when it found a compelling state interest in the right of a state to require that its police officers, but not ordinary citizens, dress and cut their hair uniformly. The majority held that the state had a direct interest only in having a uniformed police force.

By contrast, a state has only an indirect interest in a motorcycle rider's decision to ride without a helmet. Its interest in this decision is legally no more direct than its interest in his decision to smoke cigarettes. The collateral argument that a helmet protects a rider from falling branches and "flying objects" (A7) fails to meet the least-restrictive-alternative test. If a state legislature really thinks that falling branches or flying objects are a primary hazard for motorcyclists, it can require that all motorcycles be equipped with windshields to protect against this, just as it requires them to be equipped with a horn, headlights, and brakes.

While the right to ride a motorcycle without a helmet, as such, may not appear to be a fundamental right, the right to make purely personal decisions free from governmental interference, of which the helmet choice is but one aspect, is fundamental. It is "the most comprehensive of rights and the right most valued by civilized men" *Olmstead*, *supra*, 277 U.S. at 478 (Brandeis, J., dissenting). That "comprehensive" right is the general right of privacy.

CONCLUSION

Certiorari should be granted and the judgment under review should be reversed.

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APPENDIX

(Dated June 13, 1989)

David L. PICOU,
Plaintiff-Appellant,

v.

Jim GILLUM, Sheriff of Pasco County
and James T. Russell, State Attorney,
Defendants-Appellees.

No. 88-3442.

United States Court of Appeals,
Eleventh Circuit.

June 13, 1989.

Motorcycle operator brought constitutional challenge to Florida statute requiring motorcycle riders to wear protective headgear. The United States District Court for the Middle District of Florida, No. 86-93-CIV-T-15-C, William J. Castagna, J., dismissed, and operator appealed. The Court of Appeals, 813 F.2d 1121, vacated and remanded. On remand, the District Court, found that statute survived operator's privacy challenge, and operator again appealed. The Court of Appeals, Powell, Associate Justice of Supreme Court (Retired), sitting by designation, held that statute did not violate right to privacy or broader rights characterized by operator as rights "to be let alone" by government and to be free from "paternalistic" legislation.

Affirmed.

Automobiles (Key) 6

Constitutional Law (Key) 82(6)

State statute requiring motorcycle riders to wear protective headgear did not violate constitutional right to privacy or rights characterized by motorcycle operators as rights "to be let alone" by government and to be free from "paternalistic" legislation; statute constituted valid exercise of state's police powers to prevent unnecessary injury to riders themselves and to prevent public from having to bear costs of such injury, and there was no broad legal or constitutional right to be let alone. West's F.S.A. § 316.211; U.S.C.A. Const.Amends. 1, 5, 14.

Appeal from the United States District Court for the Middle District of Florida.

Before POWELL*, Associate Justice (Retired), United States Supreme Court, RONEY, Chief Judge, and HILL, Circuit Judge.

POWELL, Associate Justice:

The question presented is whether the federal Constitution prohibits Florida from requiring riders of motorcycles to wear protective headgear. We think Florida's statute a valid exercise of the State's police powers, and therefore affirm the district court.

I.

Appellant David L. Picou brought this suit against appellee Jim Gillum, Sheriff of Pasco County, Florida, and appellee James T. Russell, Florida State Attorney for

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*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, retired, sitting by designation.

Pasco County, seeking a declaratory judgment that Florida's mandatory motorcycle helmet law, Fla.Stat. § 316.211, is unconstitutional. The Florida statute provides in relevant part:

> (1) No person shall operate or ride upon a motorcycle unless he is properly wearing protective headgear securely fastened on his head which complies with standards established by the department.
>
> (2) No person shall operate a motorcycle unless he is wearing an eye-protective device over his eyes of a type approved by the department.

Appellant's complaint alleged that he uses a motorcycle as his primary means of transportation, that he wishes to ride without a helmet, and that appellees have enforced the statute by arresting and prosecuting violators in Pasco County and will continue to do so.

Appellant contended that the statute violated federal constitutional rights to Due Process, Equal Protection, and privacy. The district court dismissed the complaint on the authority of *Simon v. Sargent*, 346 F.Supp. 277 (D. Mass.1972), *aff'd mem.*, 409 U.S. 1020, 93 S.Ct. 463, 34 L.Ed.2d 312 (1972). On appeal, a panel of this Court held that because the district court in *Simon* did not address a privacy claim, the Supreme Court's summary affirmance in that case was not dispositive. The case was therefore remanded to the district court for consideration of appellant's privacy argument. See *Picou v. Gillum*, 813 F.2d 1121 (11th Cir.1987). The district court held that the Supreme Court's privacy opinions did not support appellant's contentions, and upheld the helmet statute.

II.

This appeal presents us with the latest in a long line of challenges to the constitutionality of mandatory helmet laws. Helmet statutes have been the subject of numerous published opinions from state courts. Although a few courts in the late 1960's and early 1970's held motorcycle helmet laws unconstitutional,[1] each of these cases has been reversed or overruled. Courts in subsequent cases have uniformly upheld the provisions.[2] Indeed, various constitutional challenges to Florida's statute have been rejected both by Florida courts, see *Hamm v. State*, 387 So.2d 946 (Fla.1980); *Cesin v. State*, 288 So.2d 473 (Fla.1974);

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1. See *People v. Fries*, 42 Ill.2d 446, 250 N.E.2d 149 (1969), *overruled, People v. Kohrig*, 113 Ill.2d 384, 101 Ill.Dec. 650, 498 N.E.2d 1158 (1986) (per curiam), *appeal dismissed sub nom. Kohrig v. Illinois*, 479 U.S. 1073, 107 S.Ct. 1264, 94 L.Ed.2d 126 (1987); *American Motorcycle Association v. Davids*, 11 Mich.App. 351, 158 N.W.2d 72 (1968), *overruled, People v. Poucher*, 67 Mich.App. 133, 240 N.W.2d 298, *aff'd*, 398 Mich. 316, 247 N.W.2d 798 (1976); *Everhardt v. City of New Orleans*, 208 So.2d 423 (La.App. 1968), *rev'd*, 253 La. 285, 217 So.2d 400 (La.1968), *appeal dismissed*, 395 U.S. 212, 89 S.Ct. 1775, 23 L.Ed.2d 214 (1969). These courts found that helmet laws were beyond the police power of the State because they were intended to safeguard only the cyclist, and did not benefit the public.

2. See *Bogue v. Faircloth*, 316 F.Supp. 486, 489 (1970) (collecting cases up to 1970). Later cases from state supreme courts rejecting constitutional challenges to mandatory helmet laws include *State v. Eighth Judicial District*, 101 Nev. 658, 708 P.2d 1022 (1985); *State v. Quinam*, 367 A.2d 1032 (Me.1977); *State v. Merski*, 113 N.H. 323, 307 A.2d 825 (1973); *State v. Lombardi*, 110 R.I. 776, 298 A.2d 141 (1972); *City of Kenosha v. Dosemagen*, 54 Wis.2d 269, 195 N.W.2d 462 (1972); *State v. Acker*, 26 Utah 2d 104, 485 P.2d 1038 (1971); *Penney v. City of North Little Rock*, 248 Ark. 1158, 455 S.W.2d 132 (1970); *State v. Albertson*, 93 Idaho 640, 470 P.2d 300 (1970); *City of Wichita v. White*, 205 Kan. 408, 469 P.2d 287 (1970); *Commonwealth v. Coffman*, 453 S.W.2d 759 (Ky.1970); and *State v. Edwards*, 287 Minn. 83, 177 N.W.2d 40 (1970). An even greater number of state intermediate courts have reached the same conclusion. The cyclists in these cases presented numerous arguments, including Equal Protection and First Amendment claims, as well as the privacy argument presented by appellant here.

State v. Eitel, 227 So.2d 489 (1969), and by a three-judge federal district court, see *Bogue v. Faircloth*, 316 F.Supp. 486 (S.D.Fla.1970).

A.

Appellant first relies on Supreme Court cases recognizing a right to privacy. The Due Process Clause of the Fourteenth Amendment embodies important protections against state intrusion on intimate and fundamental personal decisions. As in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 570 (1965), the right extends to reproductive decisions that are by their nature highly private. Also protected are decisions concerning the structure of the family unit, see *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (opinion of Powell, J.), and parental freedom to control the education of their children, *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). But the rights involved in these cases do not resemble the right claimed here. There is little that could be termed private in the decision whether to wear safety equipment on the open road. Indeed, the Supreme Court has repeatedly declined to recognize a constitutional right that would cover appellant's case.[3]

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3. In addition to the summary affirmance in *Sargeant*, the Supreme Court has dismissed for want of a substantial federal question appeals from other state court decisions in other similar cases. *Bisenius v. Karns*, 42 Wis.2d 42, 165 N.W.2d 377, *appeal dismissed*, 395 U.S. 709, 89 S.Ct. 2033, 23 L.Ed.2d 655 (1969), involved a challenge to a motorcycle helmet law on the broad ground that it unconstitutionally infringed on personal liberty. *People v. Kohrig*, 113 Ill.2d 384, 101 Ill.Dec. 650, 498 N.E.2d 1158 (1986), *appeal dismissed sub nom. Kohrig v. Illinois*,

(Continued on following page)

B.

Appellant concedes that his case is not covered by existing precedents defining the right to privacy. He contends, however, that those precedents stand for a broader proposition: that the Constitution protects the "right to be let alone." See *Bowers v. Hardwick*, 478 U.S. 186, 199, 106 S.Ct. 2841, 2848, 92 L.Ed.2d 140 (1986) (Blackmun, J., dissenting); *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (Brandeis, J., dissenting). He further casts his argument in terms of a right to be free from "paternalistic" legislation. In other words, appellant argues that the Constitution forbids enforcement of any statute aimed only at protecting a State's citizens from the consequences of their own foolish behavior and not at protecting others.

First, there is no broad legal or constitutional "right to be let alone" by government. In the complex society in which we live, the action and nonaction of citizens are subject to countless local, state, and federal laws and regulations. Bare invocation of a right to be let alone is an appealing rhetorical device, but it seldom advances legal inquiry, as the "right"—to the extent it exists—has no meaning outside its application to specific activities. The Constitution does protect citizens from

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Footnote continued—

479 U.S. 1073, 107 S.Ct. 1264, 94 L.Ed.2d 126 (1987), was a challenge to a mandatory seatbelt law based on privacy and other grounds. *Richards v. Texas*, 743 S.W.2d 747 (Tex.App. 1987), *review denied*, 757 S.W.2d 723 (Tex.App.1988) (en banc), *appeal dismissed*, ... U.S. ....., 109 S.Ct. 1105, 103 L.Ed.2d 170 (1989), was a helmet case in which the cyclist raised Equal Protection and personal liberty arguments. The Supreme Court's summary dispositions are of course entitled to full precedential respect. E.g., *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

government interference in many areas—speech, religion, the security of the home. But the unconstrained right asserted by appellant has no discernable bounds, and bears little resemblance to the important but limited privacy rights recognized by our highest Court. As the Court has stated, "the protection of a person's *general* right to privacy—his right to be let alone by other people—is like the protection of his property and his very life, left largely to the law of the individual States." *Katz v. United States*, 389 U.S. 347, 350-51, 88 S.Ct. 507, 510-11, 19 L.Ed.2d 576 (1967) (citations omitted).

Whatever merit may exist in appellant's further contention that paternalistic legislation is necessarily invalid, this argument is inapplicable to Fla.Stat. § 316.211. The helmet requirement does not implicate appellant alone. Motorcyclists normally ride on public streets and roads that are maintained and policed by public authorities. Traffic is often heavy, and on highways proceeds at high rates of speed. The required helmet and faceshield may prevent a rider from becoming disabled by flying objects on the road, which might cause him to lose control and involve other vehicles in a serious accident. See *Bogue*, 316 F.Supp. at 489.

It is true that a primary aim of the helmet law is prevention of unnecessary injury to the cyclist himself. But the costs of this injury may be borne by the public. A motorcyclist without a helmet is more likely to suffer serious head injury than one wearing the prescribed headgear. State and local governments provide police and ambulance services, and the injured cyclist may be hospitalized at public expense. If permananetly disabled, the cyclist could require public assistance for many years. As Professor Tribe has expressed it, "[in] a society un-

willing to abandon bleeding bodies on the highway, the motorcyclist or driver who endangers himself plainly imposes costs on others." L. Tribe, *American Constitutional Law* § 15-12, at 1372 (2d ed. 1988). Leaving aside the deference traditionally accorded to state highway safety regulation, see, e.g., *Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 675, 101 S.Ct. 1309, 1318, 67 L.Ed.2d 580 (1981), we think Florida's helmet requirement a rational exercise of its police powers.

III.

There is a strong tradition in this country of respect for individual autonomy and mistrust of paternalistic legislation. Appellant, like many of his predecessors in helmet law cases, cites John Stuart Mill for the proposition that "the only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." J. Mill, *On Liberty* (1859). In fact, Thomas Jefferson presaged Mill by three quarters of century, writing in 1787 that "the legitimate powers of government extend to such acts only as are injurious to others." *Notes on the State of Virginia* in *Jefferson, Writings* 285 (Library of America ed. 1984). But the impressive pedigree of this political ideal does not readily translate into a constitutional right.

Legislatures and not courts have the primary responsibility for balancing conflicting interests in safety and individual autonomy. Indeed, the evidence suggests that arguments asserting the importance of individual autonomy may prevail in the political process. In the mid-1970's, opponents of helmet requirements successfully

lobbied for amendment of a federal law that allowed withholding of federal highway funds from States without helmet statutes. See Dardis & Lefkowitz, *Motorcycle Helmet Laws: A Case Study of Consumer Protection,* 21 J. Consumer Aff. 202 (1987). More recently, Massachusetts' mandatory seatbelt law was repealed by referendum after opponents attacked it as an infringement on personal liberties. See, e.g., Mandatory Seat Belt Foes Boycott Hearing, *The Boston Globe,* March 9, 1989, at 16.

Subsequent studies suggest that repeal of these safety measures can have a substantial cost in lives and property. See, e.g., Dardis & Lefkowitz, *supra;* Prinzinger, *The Effect of the Repeal of Helmet Use Laws on Motorcycle Fatalities,* Atlantic Econ. J., July 1982, at 35. But it is no more our role to impose a helmet requirement on this ground than to invalidate Florida's helmet law on the grounds urged by appellant. Although a narrow range of privacy rights are shielded from the political process by the Constitution, the desirability of laws such as the Florida helmet requirement is a matter for citizens and their elected representatives to decide.

IV.

We think the district court was correct to conclude that appellant "has shown no reason in history, in policy, or in logic why a constitutional right should extend to his decision to forego a motorcycle helmet." The judgment of the district court is therefore

AFFIRMED.

(Dated April 29, 1988)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 86-93-Civ-T-15C

DAVID L. PICOU,
Plaintiff,

v.

JIM GILLUM, Sheriff of Pasco County, and
JAMES T. RUSSELL, State Attorney,
Defendants.

ORDER

In this lawsuit, plaintiff challenges the constitutionality of the Florida statute requiring a motorcycle operator to wear protective headgear, *Fla. Stat.* § 316.211. This case was dismissed on May 29, 1986, but the Eleventh Circuit Court of Appeals has remanded the case for an *ab initio* consideration of plaintiff's privacy claim. *Picou v. Gillum,* 813 F.2d 1121 (11th Cir. 1987).

Thus the question presented is whether the constitutional right to privacy recognized by a line of cases culminating in *Roe v. Wade,* 410 U.S. 113 (1973), prohibits the state of Florida from mandating that motorcyclists wear helmets. This question has stirred the parties to quote from authorities from Montesque to Mill. But this Court need not range so far afield to decide the issue. As Justice White observed for the Court in *Bowers v. Hardwick,* 106 S.Ct. 2841, 2843 (1986), the reach of the right

to privacy has been limited to the areas of child rearing, education, procreation, marriage, contraception, and abortion. Not by any stretch of the imagination does the claim raised by plaintiff fall in one of these categories.

Nonetheless, plaintiff casts about manfully for a means of extending the privacy right. Primarily, plaintiff relies on dictum in *Roe v. Wade* that the recognition of the privacy right "perhaps" originated with *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891). *See Roe v. Wade*, 410 U.S. at 152. In *Botsford* the Court found that a plaintiff's privacy interests required a common law privilege precluding a compelled surgical examination. In so holding, the Court adverted that the privilege might also extended to one's wearing apparel. *Union Pacific Railway Co. v. Botsford*, 141 U.S. at 251. From this dictum built on dictum plaintiff concludes that his choice not to wear a motorcycle helmet, which plaintiff apparently characterizes as a piece of wearing apparel, falls within a zone of privacy protected by the Constitution.

But *Botsford* provides too slender a foundation to support such a load. If, as plaintiff contends, *Botsford* creates a constitutional doctrine granting a right to one's choice of clothing, it was a doctrine stillborn. The line of cases recognizing such a right begins and ends with *Botsford*. Moreover, the constitutional underpinnings of *Botsford* are far from clear. The case appears to be merely an extension of the then existing common law of privileges. And, as observed above, *Roe* and its progeny did not merely constitutionalize the common law of privacy; they carved their own niche.

Furthermore, the development of the general common law is—at least since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)—no longer the primary province of the

federal courts. As the Court observed in another context, "the protection of a person's general right of privacy—his right to be let alone by other people—is . . . left largely to the law of the individual States." *Katz v. United States*, 389 U.S. 347, 350-51 (1967) (footnotes omitted). Here, the powers that be in Florida have determined that plaintiff's general privacy interests do not require that he be free to ride his motorcycle helmetless. *See Hamm v. Florida*, 387 So.2d 946 (Fla. 1980); *Florida v. Eitel*, 227 So.2d 489 (Fla. 1969). So too have the other states that have considered the issue rejected claims such as plaintiff's. *See Nevada v. Eighth Judicial District Court*, 708 P.2d 1022 (Nev. 1985); *New York v. Bennett*, 391 N.Y.S.2d 506 (1977); *Oregon v. Fetterly*, 456 P.2d 996 (Ore. 1969); *cf. Pacific Legal Foundation v. Department of Transportation*, 593 F.2d 1338 (D.C. Cir. 1979) (seatbelt law); *Illinois v. Kohrig*, 498 N.E.2d 1158 (Ill. 1986) (same).

Plaintiff alludes to statistics, which, if accurate, tend to show that the helmet law is unwise. But plaintiff fails to acknowledge that these statistics are *legislative*, not *adjudicative*, facts. Accordingly, this Court can no more invalidate the helmet law under the guise of the right to privacy than it could force plaintiff to wear a helmet in the absence of a statute if the statistics relied on by plaintiff cut in the other direction.

Finally, the Court need not unveil a parade of horribles to demonstrate the mischief that would be worked by a rule as broad as that urged by plaintiff. Experience may yet counsel that there remain zones of privacy to be developed. But plaintiff has shown no reason in history, in policy, or in logic why a constitutional right should extend to his decision to forego a motorcycle helmet. Consequently, judgment shall be entered for defendants.

Based on the above, it is

ORDERED:

That the clerk is directed to enter judgment for defendants and against plaintiff.

DONE AND ORDERED at Tampa, Florida this 29th day of April, 1988.

/s/ William J. Castagna
William J. Castagna
United States District Judge

Copies to

Counsel of Record

(Dated April 3, 1987)

David L. PICOU,
Plaintiff-Appellant,

v.

Jim GILLUM, Sheriff of Pasco County,
James T. Russell, State Attorney,
Defendants-Appellees.

No. 86-3428
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

April 3, 1987.

Motorcycle operator brought constitutional challenge to Florida "helmet law," requiring motorcycle operators and passengers to wear protective helmets. The United States District Court for the Middle District of Florida, No. 86-93-CIV-T-15C, William J. Castagna, J., dismissed the complaint for failure to state a claim on which relief could be granted, relying on a summary affirmance by the United States Supreme Court in another federal district court case, and operator appealed. The Court of Appeals, Clark, Circuit Judge, held that where opinion of federal district court in other case did not resolve claim that similar Massachusetts "helmet law" violated motorcycle operators' right to privacy, summary affirmance of that decision by United States Supreme Court did not have binding precedential effect, so that dismissal of motorcycle operator's claim that Florida "helmet law" violated his

right to privacy would be vacated and case would be remanded for consideration ab initio of the privacy claim.

Vacated and remanded.

1. Courts (Key) 96(3)

Summary affirmance by Supreme Court of lower court decision has binding precedential effect; however, Supreme Court endorses only the result, and not the reasoning, of the lower court.

2. Courts (Key) 107

Summary affirmance by Supreme Court should not be taken as expressing a view on a legal claim or constitutional theory not presented to Supreme Court or discussed in appealed lower court opinion.

3. Courts (Key) 96(3)

Where opinion of federal district court in other case did not resolve claim that similar Massachusetts "helmet law," requiring motorcycle operators and passengers to wear protective helmets, violated motorcycle operators' right to privacy, summary affirmance of that decision by United States Supreme Court did not have binding precedential effect, so that dismissal of motorcycle operator's claim that Florida "helmet law" violated his right to privacy was vacated and case was remanded for consideration ab initio of the privacy claim. West's F.S.A. § 316.211.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, HATCHETT and CLARK, Circuit Judges.

CLARK, Circuit Judge:

This case involves a constitutional challenge to Florida's "helmet law," requiring motorcycle operators and passengers to wear protective helmets. Fla.Stat. § 316.-211 (1985). In addition to equal protection and due process challenges, Picou argues that the law violates his right to privacy or "right to be let alone" as those rights have developed in the past two decades of decisions involving abortion, contraception, and other privacy issues. The district court dismissed the complaint for failure to state a claim on which relief could be granted, relying on the Supreme Court's summary affirmance in *Simon v. Sargent*, 346 F.Supp. 277 (D.Mass.), *aff'd*, 409 U.S. 1020, 93 S.Ct. 463, 34 L.Ed.2d 312 (1972).

In *Simon*, a three-judge district court panel rejected arguments that a similar Massachusetts helmet law exceeded the state's police powers and denied the motorcycle operator equal protection by not requiring operators of other motor vehicles to wear helmets. 346 F.Supp. at 279. The Supreme Court affirmed without argument or opinion.

[1, 2] A summary affirmance by the Supreme Court has binding precedential effect. *See Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975). In a summary affirmance, however, the Supreme Court endorses only the result, and not the reasoning, of the court below. *See Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977). "[T]he rationale of the affirmance may not be gleaned solely from the opinion below." *Id.* Summary affirmances only "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Id.* Thus, summary affirmances should not be taken as expressing a view on a legal claim or constitu-

tional theory not presented to the Supreme Court or discussed in the appealed lower court opinion.

[3] In their briefs before this court, all of the parties in this case apparently now agree that the *Simon v. Sargent* opinion did not address or resolve the privacy implications of motorcycle helmet laws. *See* Appellant's Brief at 5-6; Appellee Russell's Brief at 3; Appellee Gillum's Brief at 2, 4 (noting but not attacking appellant's contention that *Simon* does not address privacy). After reviewing the *Simon* opinion ourselves, we agree that it did not resolve the privacy claim, which is based in part on cases issued after the *Simon* opinion. *See, e.g., Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

Thus, the Supreme Court's summary affirmance in *Simon* does not control this case. Without expressing a view on the merits of Picou's claim, we therefore vacate the judgment of the district court and remand this case to that court for consideration *ab initio* of the privacy claim.

VACATED and REMANDED.

(Filed June 4, 1986)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 86-93-Civ-T-15(C)

DAVID L. PICOU,
Plaintiff,

vs.

JIM GILLUM, Sheriff of Pasco County, and JAMES T. RUSSELL, State Attorney,
Defendants.

ORDER

The Court has considered the status of this case in which the plaintiff, a motorcyclist, challenges the constitutionality of Florida's helmet law, § 316.211 Florida Statutes (1985). The defendants have filed a motion to dismiss and rely upon *Simon v. Sargent,* 346 F.Supp. 277 (D. Mass. 1972), *aff'd* 409 U.S. 1020 (1973) for the proposition that states have the right to require motorcyclists to wear protective headgear. The defendants' position is convincing.

Having considered the foregoing, it is

ORDERED:

1. That the complaint is dismissed for failure to state a claim.

DONE AND ORDERED at Tampa, Florida this 3rd day of June, 1986.

/s/ William J. Castagna
William J. Castagna
United States District Judge

Copies to

Counsel of Record

(Dated June 13, 1989)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-3442
D.C. Docket No. 86-93

DAVID L. PICOU,
Plaintiff-Appellant,

versus

JIM GILLUM, Sheriff of Pasco County and JAMES T. RUSSELL, State Attorney,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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Before POWELL*, Associate Justice (Retired), United States Supreme Court, RONEY, Chief Judge, and HILL, Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

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*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, retired, sitting by designation.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered:

June 13, 1989

For the Court:

Miguel J. Cortez, Clerk
By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: July 5, 1989